IN THE MISSOURI SUPREME COURT

DAVID L. HARJOE,	)	
	)	
Respondent,	)	
	)	
v.	)	Supreme Court No. SC 84858
	)	
HERZ FINANCIAL,	)	
	)	
Appellant.	)	

Appeal from the Associate Circuit Court of St. Louis County
Twenty-First Judicial Circuit
Division 31
Honorable Barbara Ann Crancer

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Appellant Herz Financial appeals from a final judgment entered by the Associate Circuit Court of St. Louis County, Missouri. On May 17, 2002, The Honorable Barbara Ann Crancer entered summary judgment in favor of Respondent and against Appellant on the parties' cross-motions for summary judgment.

While this appeal raises procedural errors and identifies genuine issues of material fact precluding the judgment below, jurisdiction lies in the Missouri Supreme Court as this appeal predominantly involves the validity of a statute of the United States, namely, the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). Specifically at issue is, *inter alia*, whether the TCPA's ban on unsolicited facsimile advertising is unconstitutionally vague and unconstitutionally restricts protected commercial speech. A finding that the TCPA is unconstitutional on either of these bases would be dispositive of all issues in this civil action.

This Court therefore has exclusive appellate jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution. This appeal was properly transferred from the Missouri Court of Appeals, Eastern District, pursuant to Article V, Section 11 of the Missouri Constitution.

SUMMARY OF THE CASE

The trial court erred in granting Respondent's Motion for Summary Judgment and denying Appellant's Motion for Summary Judgment because Respondent failed to demonstrate that Appellant's constitutional challenges to the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (hereinafter "TCPA" or "the Act") and affirmative defenses fail as a matter of law.

Specifically, the TCPA's blanket ban on unsolicited ***commercial*** fax advertising is constitutionally infirm for three independent reasons and should not be enforced. First, the ban violates the First Amendment to the United States Constitution under the test for commercial speech articulated by the United States Supreme Court in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). To withstand Appellant's First Amendment challenge, Respondent had the burden of proving that (1) the TCPA "directly advances the governmental interest asserted;" (2) the TCPA is "not more extensive than is necessary to serve" that interest; and (3) the TCPA serves a governmental interest that is "substantial." Id. at 566. Respondent did not prove any of these requirements.

The TCPA's ban on unsolicited fax advertising does not serve a substantial governmental interest. Through the TCPA, Congress was trying to relieve fax machine owners of two kinds of perceived harm: the inability to use their machines while the machines were tied up with unsolicited faxes and the cost of the paper and toner used to print those faxes. These interests

were not substantial when the TCPA was enacted, however, and—more to the point—in light of advances in fax technology, they are even more insubstantial today. Unsolicited faxes do not prevent recipients from using their fax machines, because machines are now much faster than they were in 1991, and are equipped with features that allow them to be used even while a fax is being received. Meanwhile, the pennies it costs to receive an unsolicited fax is so low—and approaching zero with the emergence and increasing use of fax to e-mail technology whereby the fax need never be printed—as to be *de minimis*.

The TCPA does not directly advance the government's interest in shielding recipients from the cost and inconvenience of unsolicited faxes. The cost and inconvenience of a fax are identical whether the fax contains an advertisement or something else, but the TCPA prohibits only ***commercial*** faxes. The TCPA is so full of inconsistencies and exemptions, moreover, that it does not directly advance the goal of shielding consumers from cost and inconvenience.

The TCPA's ban on unsolicited fax advertisements also is more extensive than necessary because there are other ways of solving the problem of unwanted faxes that would restrict much less speech. One obvious alternative is the regulatory scheme the TCPA itself provides for telemarketing, under which advertisers are liable only for calling a person a second time, after the person has requested no further calls. See 47 U.S.C. § 227(c)(5). Another alternative would be to set up a "no-fax"

list, a database of fax numbers of people who do not wish to receive unsolicited faxes. A "no-fax" list is clearly feasible, given that many states have already established successful "no-call" lists of numbers that are off-limits to telemarketers. Either of these alternatives would restrict much less speech than the TCPA does, because they would allow fax machine owners, many of whom ***want*** to receive faxes containing unsolicited restaurant coupons and the like, to continue doing so. There is no explanation in the TCPA or its legislative history or in Respondent's briefs below as to why Congress chose to ban unsolicited fax advertising instead.

With this irrational statutory scheme, the TCPA pulls the plug on a uniquely immediate, inexpensive and targeted method of disseminating commercial speech. The TCPA must be struck down as an unconstitutional interference with the First Amendment right to the free flow of commercial information enjoyed not only by the fax advertisers who communicate that valuable information, but also the consumers who welcome it.

Second, the TCPA is unconstitutionally vague, because the TCPA's definition of "unsolicited advertisement," – see 47 U.S.C. § 227(a)(4) ("material advertising the commercial availability or quality of any property, goods, or services") – fails to give sufficient guidance as to what is prohibited by the Act and permits selective enforcement of the Act. The TCPA thus chills free speech by prompting people to cut a wide path around the TCPA's ill-defined unlawful zone so as not to subject themselves to the Act's draconian penalties. Under the void-for-vagueness doctrine, therefore,

the TCPA violates the due process guarantees of the Fifth and Fourteenth Amendments.

Third, the TCPA creates a draconian remedy that threatens to drive legitimate businesses out of existence or into bankruptcy by imposing automatic statutory damages that are wildly disproportionate to any conceivable actual damage. The statute imposes $500 in damages, per fax transmission, for inadvertent violations, and up to $1,500 per fax transmission for knowing or willful violations. The first figure is approximately 10,000 times the actual cost of receiving a fax, the second approximately 30,000 times the actual cost of receiving a fax. That damages scheme has created a cottage industry that allows plaintiffs and their attorneys, who are often one and the same, to plunder firms that provide a uniquely cost-effective and timely method of disseminating valuable commercial information. The TCPA's damages scheme unconstitutionally imposes a grossly excessive punishment and thus violates the Fifth and Eighth Amendments to the United States Constitution.

Because of these three constitutional infirmities, the TCPA may not be enforced and Appellant was entitled to judgment on Respondent's claims under the TCPA as a matter of law.

The trial court also erred in granting Respondent's Motion for Summary Judgment because Respondent failed to comply with Missouri Supreme Court Rule 74.04 in that Respondent's motion did not direct the trial court to specific references to the pleadings, discovery or admissible

affidavit statements to support his legal conclusions and alleged ultimate facts, including the alleged amount of damages.

The trial court further erred in granting Respondent's Motion for Summary Judgment because Appellant presented a triable issue of fact as to whether it had Respondent's prior express invitation or permission to send an advertisement by fax. Finally, the trial court further erred by awarding damages in excess of the statutory amount.

STATEMENT OF FACTS

A. Background

In the late 1980s, as more and more businesses acquired fax machines, it became evident that the fax could be useful for advertising the availability of items that must be sold very quickly. Restaurants could fax news of their daily lunch specials to nearby offices. Hotels and tour operators could fill eleventh-hour vacancies quickly by faxing offers of discounts. Banks and other financial institutions could advise customers of daily and even hourly fluctuations in interest rates. The fax accordingly became a valued medium for advertisers needing to reach customers very quickly.

Fax advertising was welcomed by many of its recipients. Office workers appreciated receiving menus and discount coupons from restaurants. Travelers seized the opportunity for inexpensive, last-minute vacations. The fax machine proved to be a quick, inexpensive way of linking buyers and sellers, to the benefit of both.

Conversely, some recipients of unsolicited faxes apparently found them an annoyance. Early fax machines were slower and had little or no memory. An unwanted fax could thus tie up a machine momentarily, preventing the user from receiving or sending another fax until transmission of the first was completed. Some recipients were bothered because unsolicited faxes used their paper and toner, particularly because the earliest fax paper cost more than ordinary paper.

The fax machine thus posed a classic dilemma of speech regulation. It had given rise to a new form of commercial speech, fax advertising, that was valued by many, but which many others wished to prohibit.

B. The Legislative History of the Telephone Consumer Protection Act of 1991[1]

Congress, meanwhile, was in the midst of holding hearings on telemarketing, which was and is much more pervasive than fax advertising. These hearings encompassed a host of issues raised by new telephone technologies, such as automatic dialing and "caller ID." At these general telemarketing hearings, a handful of witnesses testified that they had received unwanted faxes. But because Congress was mostly interested in telephone solicitation, not fax advertising, there was no evidence as to whether unwanted faxes were common or rare; nor was there evidence of whether few or many unwanted faxes were advertisements. The only

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[1]This Court may take judicial notice of acts of Congress and its legislative history. Judicial notice in regard to congressional enactments is not limited to their existence, wording, and interpretation, but extends to all matters connected therewith. State v. Biddle, 599 S.W.2d 201 (Mo. 1980); See also, L & R Distributing, Inc. v. Missouri Dept. of Revenue, 529 S.W.2d 375 (Mo. 1975); Lynch v. National Life & Acc. Ins. Co., 278 S.W.2d 32 (Mo. App. 1955); and Redman v. Western & Southern Life Ins. Co., 187 S.W.2d 842 (Mo. App. 1945). For the Court's convenience, Appellant has compiled this legislative history in its appendix submitted concurrently with this brief.

evidence before Congress relating to the magnitude of any annoyance caused by advertising involved telemarketing calls, not faxes. See H.R. Rep. No. 317, 102d Cong., 1st Sess. 9 (1991). (A134–A165.)

When Congress heard testimony about faxes, moreover, it quickly became apparent that unwanted faxes could be annoying whether or not they contained advertisements. One member of Congress related how the Governor of Connecticut, while awaiting an emergency flood report, had his fax machine tied up with faxes from lobbyists against a particular bill. See Telemarketing Practices: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. 3 (1989). (A352–A383.) Another Congressman recounted how Cleveland Browns fans "fax attacked" the Houston Oilers' offices just before a key football game. 136 Cong. Rec. H5820 (daily ed. July 30, 1990). (A68–A78.) Anecdotes like these may have been rhetorically dramatic, but they involved no advertising.

Despite the fact that the handful of witnesses or members of Congress who lodged these complaints did not object ***solely*** to ***commercial*** fax advertising, the fax legislation Congress considered nonetheless addressed only commercial fax advertising, not other kinds of unwanted faxes. In May 1989, Representative Edward Markey of Massachusetts introduced the first of what would eventually be several different bills seeking to resolve the fax advertising controversy. See Telemarketing Practices: Hearing, supra. The bill would not have prohibited fax advertising. See Id. Rather, it would

have allowed fax machine owners to notify their telephone company that they did not wish to receive fax advertisements. Id. Each telephone company would have compiled a list of the fax numbers and made the list available to people wishing to send fax advertisements. Id. This proposal would have prohibited transmissions to the fax numbers on the list. Id. The cost of maintaining the lists would have been charged to the fax advertisers. Id. Those who wished to receive unsolicited offers by fax would have been able to continuing doing so.

"This bill would not eliminate fax advertising," Markey explained while introducing the bill, because fax advertising, "when conducted properly, is an established, lawful marketing practice." 135 Cong. Rec. E1462 (daily ed. May 2, 1989) (statement of Rep. Markey). (A60–A61.)

Two months later, in July 1989, Markey introduced a broader bill, one encompassing both fax advertising and telemarketing. See 135 Cong. Rec. E2549 (daily ed. July 18, 1989). (A65–A67.) The bill called for the Federal Communications Commission ("FCC") to establish a national list of fax numbers belonging to people who objected to receiving unsolicited advertising. The FCC was to make the list available to fax advertisers, who would then be prohibited from sending unsolicited advertisements to numbers on the list. H.R. Rep. No. 633, 101st Cong., 2d Sess. 12 (1990). (A166–A180.) The Congressional Budget Office reported that the process would cost the government nothing, because the expense of collecting and

updating the list of off-limits fax numbers would be borne entirely by fax advertisers. Id. at 5-6.

This second bill shifted the responsibility for maintaining the "no-fax" list from telephone companies to the FCC, but the purpose of the list remained the same. The point was to regulate fax advertising in a less restrictive way - to empower people who objected to receiving unsolicited advertisements to avoid them, while at the same time allowing people who welcomed unsolicited advertisements to continue to receive them. "It is a narrowly tailored response," explained one of the bill's sponsors on the floor of the House. "The bill balances the first amendment rights of those who wish to send with those who do not wish to receive." 136 Cong. Rec. H5820 (daily ed. July 30, 1990). (A68–A78.) The bill was passed by the House, but the 101st Congress adjourned before it could be taken up by the Senate.

The following year, in March 1991, Representative Markey introduced a third bill. Once again, Markey explained that the purpose of the bill was to provide "an electronic database mechanism through which objecting individuals and business subscribers can free themselves from unwanted telephone solicitations, including solicitations using facsimile machines." 137 Cong. Rec. E793 (daily ed. March 6, 1991) (statement of Rep. Markey). (A84–A86.) The bill would have delegated to the FCC the task of deciding exactly how to accomplish this goal. See H.R. Rep. No. 317, 102d Cong., 1st Sess. 5 (1991). (A134–A165.) The House Committee on Energy and Commerce reported that the bill "does not attempt to make all

unsolicited telemarketing or facsimile advertising illegal." Instead, the Committee explained, the bill "is designed to return a measure of control to both individual residential telephone customers and owners of facsimile machines." Id. at 6. This bill was passed by the House in November 1991. See 137 Cong. Rec. H10,344 (daily ed. Nov. 18, 1991). (A87.)

In the interim, however, the Senate had passed two bills that were much more restrictive. Cf. 137 Cong. Rec. S16204-08 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). (A109–A133.) Both banned the sending of unsolicited fax advertisements. See S. Rep. No. 177, 102d Cong., 1st Sess. 16 (1991) (A318–A337.); S. Rep. No. 178, 102d Cong., 1st Sess. 12 (1991). (A338-A351.)

The legislative history of these bills indicates the Senate gave no consideration to the House's alternative of a "no-fax" list. The subcommittee hearing on these bills, the only hearing the Senate conducted, was almost entirely devoted to telemarketing and the new telephone technologies. There was little discussion of fax advertising, and no discussion whatsoever of which approach to fax advertising—a complete ban or a "no-fax" list—would be better. See S. 1462, The Automated Telephone Consumer Protection Act of 1991 (A283-A315); S. 1410, The Telephone Advertising Consumer Protection Act (A262-A282); and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 102d Cong., 1st Sess. (1991). (A316-A317.) Nor was there

any such discussion on the floor of the Senate. See generally 137 Cong. Rec. S16,200-08 (daily ed. Nov. 7, 1991). (A109-A133.) Without any debate, testimony, or evidence of any kind as to whether a "no-fax" list would be a feasible solution to the problem of unwanted faxes, the Senate opted for the more restrictive alternative.

When the Senate and House bills were reconciled, the Senate's more restrictive version of fax regulation prevailed. Again, the legislative history is silent as to why Congress chose the bill that restricted more speech over the bill that restricted less. With no discussion, and without considering any evidence of a real problem, the House acceded to the Senate's ban on unsolicited fax advertising. See 137 Cong. Rec. H11,307-15 (daily ed. Nov. 26, 1991).

C. The Telephone Consumer Protection Act of 1991.

The resulting statute was the Telephone Consumer Protection Act of 1991 ("TCPA"), codified at 47 U.S.C. § 227.[2] (A1-A6.) In relevant part,

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[2]Congress passed the statute despite the FCC's advice that the TCPA was unnecessary because the market would control telemarketing practices on its own. Hearing Before Subcomm. on Communications of the Comm. on Commerce, Science and Transportation, 102d Cong. 54 (1991) (statement of Alfred C. Sikes). According to Chairman Sikes, "An organization that is trying to sell something … has an incentive to direct calls to those most likely to be interested, to limit calls to reasonable hours, and to conduct such calling in an appropriate fashion." Id. at 55.

the statute provides: "It shall be unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The term "unsolicited advertisement" is defined in the statute as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). Although advertising generally means promoting or publicizing any information, commercial or non-commercial, the TCPA prohibits only advertisements containing ***commercial*** information.[3]

Recipients of unsolicited fax advertisements are entitled to damages of $500 per fax transmission for inadvertent violations of the TCPA, and up to $1,500 per fax transmission for knowing or willful violations, an amount more than 30,000 times the actual cost of receiving an unwanted fax.[4] See 47 U.S.C. § 227(b)(3). Since 1991, this damages scheme has spawned a cottage industry. In some of these TCPA suits, the plaintiffs' class-action

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[3]For convenience, "advertising" in this brief refers to *commercial* advertising, unless otherwise expressly noted.

[4]Based on a conservative estimate, the average cost to print a fax is five cents per page. Herz Financial's fax technology expert submitted an affidavit citing the fact that numerous fax machines can print a fax for less than two cents per page. (LF 81.)

bar has sought astonishingly high damages. See, e.g., Nicholson v. Hooters of Augusta, Inc., Civil Action File No. 95-RCCV-616 ($11,889,000 judgment). (LF 223, 262-302.)

In contrast to the severe penalties imposed on senders of unsolicited faxes, the TCPA treats telemarketers less harshly. For example, the statute imposes liability on telemarketers only when they call a person a *second* time within twelve months, after the person has requested no further calls. See 47 U.S.C. § 227(c)(5). Neither the statute nor the legislative history explains why Congress thought telemarketers, but not faxers, could maintain lists of people who do not wish to be disturbed. The statute also directs the FCC to consider various other methods of protecting the privacy of residential telephone subscribers. One of the methods the FCC is supposed to consider, curiously enough, is the creation of "a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." 47 U.S.C. § 227(c)(3). Neither the statute nor the legislative history explains why Congress thought such a database might be effective to prevent unwanted telephone calls but not unwanted faxes.

The TCPA's disparate treatment of fax advertising and telephone advertising is particularly curious in light of the contrast between, on the one hand, the lack of meaningful evidence before Congress about fax advertising, and, on the other, the extensive record before Congress about consumer annoyance with telemarketing calls. See H.R. Rep. 317, 102d

Cong., 1st Sess. 7 (1991) ("Each day over 300,000 solicitors call more than 18 million Americans"). (A135.) See also id. at 8-9 (describing surveys finding that 67% of residential telephone customers consider telemarketing calls "very annoying"). Yet, Congress chose to facilitate the growth of the telemarketing industry, while prohibiting unsolicited fax advertising.

It may shed some light on these puzzles to note that the only advertising industry group to testify before Congress was an organization of firms that advertise by direct mail and telephone. That organization, by its own account, worked closely with Congressional members and staff in formulating the TCPA, and agreed that Congress should ban fax advertising. See Hearing on S. 1462, at 35 & n.1. One may reasonably suspect that this organization was concerned about protecting the interests of its own members and not those of other marketers that offered the competing medium of advertising by fax.

D. The State of the TCPA in the Eastern District of Missouri

On March 13, 2002, Senior District Judge Stephen N. Limbaugh held that the provision of the TCPA which prohibits facsimile advertisements violated the First Amendment's guarantee of freedom of speech. Missouri *ex rel*. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002) ("Missouri"). (A9-A20.) Applying the First Amendment test applicable to regulations of commercial speech set forth in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), the court held that the government failed to demonstrate a substantial interest in

preventing the purported harm the TCPA sought to regulate. The court also held that the TCPA failed to directly advance the government's purported interest in preventing the shift of the cost of sending a commercial message from the sender to the recipient as cost-shifting also occurs for sending unsolicited jokes, political information, opinion polls, and even some advertisements, such as help wanted advertisements, which are not included in the definition of the TCPA. Finally, the court held that the existence of a variety of alternatives less intrusive to First Amendment rights, such as a "no-fax" database, demonstrates that the TCPA is more extensive than necessary.

The judgment of the Associate Circuit Court of St. Louis County, Missouri, is at odds with that of the United States District Court for the Eastern District of Missouri. Uniquely, a federal statute has been held unconstitutional by a federal court and constitutional by a state court which sits within the same jurisdiction as the federal court. Consequently, potential fax senders in the Eastern District of Missouri must guess as to whether their conduct is legal.

E. Statement of the Case and Factual Background

On or about July 24, 2001, Respondent David L. Harjoe ("Harjoe") filed his Petition for Breach of the Telephone Consumer Protection Act. (LF 8-29.) Harjoe's petition alleged that, on nine separate dates over a period of approximately 14 months, Appellant Herz Financial willfully or knowingly

sent or caused to be sent unsolicited advertisements by facsimile to Harjoe's facsimile number. (LF 8-29; A21-A38.)

On October 12, 2001, Herz Financial filed its Answer and raised the following affirmative defenses: that the TCPA is unconstitutionally vague, unconstitutionally restricts protected commercial speech, and creates a grossly excessive unconstitutional damages remedy; that Harjoe is not the proper party and lacks standing as he received the alleged faxes while in the course and scope of his employment with Northwestern Mutual Life; that the alleged facsimiles were sent with the prior express invitation or permission of Harjoe; and that Harjoe failed to mitigate his damages, if any, by failing to request to be placed on Herz Financial's no-fax list, or by taking any other action. (LF 30, 33-34.)

On January 31, 2002, and on February 1, 2002, the parties filed cross-motions for summary judgment and memoranda in support of same. (LF 42, 46, 75, 157.) On February 1, 2002, in connection with the cross-motions, the parties filed stipulated facts. (LF 222.) The stipulated facts demonstrate that Herz Financial voluntarily sent or caused to be sent nine fax transmissions, each consisting of two pages, to fax number (314) 878-7277 over a time span of approximately 14 months. (LF 222-223.) The parties also stipulated that, on or about January 11, 2002, the FCC in In the Matter of 21st Century Fax(es) Ltd. a.k.a. 21st Century Fax(es), File No. EB-00-TC-174, fined 21st Century Fax(es) $1,107,500 for sending opinion poll faxes in

violation of the TCPA. (LF 223.)[5] Finally, the parties stipulated that, on April 25, 2001, the Superior Court of Richmond County, State of Georgia, in Nicholson v. Hooters of Augusta, Inc., Civil Action File No. 95-RCCV-616, entered judgment in favor of class plaintiffs and against Hooters of Augusta, Inc. in the amount of $11,889,000. Thereafter, Hooters of Augusta, Inc. filed for bankruptcy. (LF 223.)[6]

In addition to the stipulated facts, Harjoe alleged, without citations to the pleadings, discovery or affidavits, ultimate facts that each fax at issue contained material advertising the commercial availability or quality of property, goods or services and were created for advertising purposes. (LF 43.) Harjoe further alleged, citing to his own affidavit, that he did not grant prior express permission to Herz Financial to permit the sending of the faxes at issue, that Herz Financial had no established business relationship with Harjoe, and that Herz Financial had no documents to support any claim of prior express permission or an established business relationship. (LF 44.)

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[5]True and accurate copies of the Notice of Apparent Forfeiture and Forfeiture Order are located at LF 243 and LF 255.

[6]A true and accurate copy of the Hooters Judgment is located at LF 262, and true and accurate copies of information available from the United States Bankruptcy Court, Northern District of Georgia are located at LF 271.

Herz Financial, by Affidavit of its Vice President of Sales, Matthew Herz, responded by identifying genuine issues of material fact with supporting documentation. (LF 496-499.) Herz Financial obtained fax number (314) 878-7277 only through direct contact by Harjoe or someone purporting to be Harjoe. (LF 496.) This direct contact with Herz Financial could only have been via its web site at www.justdi.com, via telephone or by some other form of direct contact. (LF 496.) Herz Financial also supplied a database printout containing information directly provided to Herz Financial, including facsimile number (314) 878-7277. (LF 498-499.)

Herz Financial also responded to these allegations by raising genuine issues of material fact with respect to Harjoe's standing. (LF 486.) Herz Financial raised standing as an affirmative defense as Harjoe received the faxes during the course and scope of his employment with Northwestern Mutual Life. (LF 486.) This is evidenced by the subject faxes being addressed to David L. Harjoe at Northwestern Mutual Life and by the fax banners (the printing on the top of the faxes) which reference "CLU Northwestern." (LF 486; see, e.g., LF 22-23; A31-A32.)

Herz Financial also raised genuine issues of material fact with respect to the number of alleged violations. (LF 487.) Harjoe contended that 18 violations occurred, one for each page received; however, the pages were actually sent as nine separate transmissions consisting of two pages per transmission. (LF 487, 496-497.)

Finally, Herz Financial opposed Harjoe's motion on the basis that Harjoe failed to demonstrate that Herz Financial's other affirmative defenses fail as a matter of law. In addition to the affirmative defense of lack of standing, discussed above, Herz Financial alleged that the TCPA is unconstitutionally vague, unconstitutionally restricts protected commercial speech, and creates a damages remedy that unconstitutionally imposes a grossly excessive punishment. (LF 493.)

Herz Financial also alleged that Harjoe failed to mitigate his damages by failing to request to be placed on Herz Financial's no-fax list or by taking any other action. (LF 494, 98.) The first facsimile allegedly received by Harjoe states, "please call toll free at 1-800-432-8086 or fax this back with your fax # to have your fax number permanently removed from our customer list." (LF 12, 98; A21.) Herz Financial maintains a do-no-fax list. (LF 98.) Any person receiving a fax from Herz Financial may call the "800" number on each fax and request to be placed on the no-fax list. (LF 98.)

Herz Financial also raised the unconstitutionality of the TCPA in its own Motion for Summary Judgment. (LF 75, 494.) Herz Financial's Motion for Summary Judgment, and Harjoe's response thereto, raised facts in addition to those raised in connection with Harjoe's motion. (LF 75-155.) The additional facts before the trial court on the cross motions for summary judgment demonstrate that fax machines have numerous technological features, including memory, dual access memory, auto-redial, toner saver, fax number blocking, distinctive ringing, volume control and fax-to-email

technology, all which drastically reduce or eliminate any perceived annoyance or cost associated with unsolicited faxes. (LF 79-77.) The additional facts also include other examples of unsolicited faxes to which the TCPA may not apply. (LF 100-156.)

On March 15, 2002, Harjoe filed "Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss," and failed to respond to the factual allegations set forth in Herz Financial's motion for summary judgment. (LF 755.) Harjoe's motion for leave to file a proper response was granted without objection as to the timeliness of the response; however, all objections to the form, sufficiency and content of the late response were preserved. (LF 766.) Harjoe's amended response does not specifically deny the facts set forth in Herz Financial's motion, but simply incorporates by reference his Memorandum of Law in Opposition to Defendant's Motion to Dismiss, and all affidavits attached thereto. (LF 757-758.)

On April 8, 2002, Herz Financial filed Evidentiary Objections and a Motion to Strike evidence proffered by Harjoe in his Memorandum in Opposition to Defendant's Motion for Summary Judgment. (LF 741.) On May 17, 2002, the trial court granted the Motion to Strike, in part, and also granted Harjoe's Motion for Summary Judgment and denied Herz Financial's Motion for Summary Judgment. (LF 773-774; A7-A8.)

POINTS RELIED ON

I. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion For Summary Judgment, Because The TCPA Violates The First And Fourteenth Amendments To The United States Constitution, In That The TCPA Is More Extensive Than Necessary To Serve Any Asserted Governmental Interest, The TCPA Does Not Directly Advance The Asserted Governmental Interest, And The TCPA's Ban On Unsolicited Fax Advertisements Does Not Serve A Substantial Governmental Interest.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993)

Thompson v. Western States Medical Center, 122 S. Ct. 1497 (2002)

U.S. CONST., AMENDS. I AND XIV

II. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion For Summary Judgment, Because The TCPA Violates The Fifth and Fourteenth

Amendments To The United States Constitution, In That The TCPA Fails To Give Potential Fax Senders Adequate Warning Of The Conduct The Act Proscribes And, Therefore, The Act Is Unconstitutional Under the Void-For-Vagueness Doctrine.

Connally v. General Constr. Co., 269 U.S. 385 (1926)

A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925)

Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, *reh'g denied*, 456 U.S. 950 (1982)

U.S. CONST., AMENDS. V AND XIV

III. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion For Summary Judgment, Because The TCPA Violates Constitutional Due Process Guarantees And The Eighth Amendment, In That The TCPA Imposes A Grossly Excessive Punishment On Persons Alleged To Have Violated Its Prohibition On Unsolicited Fax Advertising.

TXO Productions Corp. v. Alliance Resources Corp., 509 U.S. 443, (1993)

BMW of North America v. Gore, 517 U.S. 559 (1996)

United States v. Bajakajian, 424 U.S. 321 (1998)

U.S. CONST., AMENDS. V, VIII AND XIV

IV. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because It Incorrectly Applied the Summary Judgment Standard, In That It Failed To Require Harjoe To Demonstrate That Herz Financial's Affirmative Defenses Of Lack Of Standing, Failure To Mitigate, And The Unconstitutionality Of The TCPA Fail As A Matter Of Law, And In That The Trial Court Ignored Genuine Issues Of Material Fact Related To Herz Financial's Affirmative Defenses.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Central Missouri Elec. Co-op. v. Wayne, 18 S.W.3d 46 (Mo. App. W.D. 2000)

Miller v. Big River Concrete, LLC, 14 S.W.3d 129 (Mo. App. E.D. 2000)

V. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment Because, The Motion Failed To Comply With Missouri Supreme Court Rule 74.04, In That Harjoe Set Forth Legal Conclusions And Ultimate Facts Without Specific Citations To

Pleadings, Discovery Or Admissible Affidavit Statements.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Missouri Insurance Guaranty Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28 (Mo. App. 1991)

Bakewell v. Missouri State Employees' Retirement System, 668 S.W.2d 224, *on remand*, 706 S.W.2d 268 (Mo. App. 1986)

MO. SUPREME COURT RULE 74.04

VI. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because Harjoe Failed To Satisfy The Summary Judgment Standard, In That Herz Financial Demonstrated The Existence Of Genuine Issues Of Material Fact With Respect To Whether Harjoe Had Given Express Invitation Or Permission To And Whether Harjoe Had An Established Business Relationship With Herz Financial.

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

New Prime, Inc. v. Professional Logistics, 28 S.W.3d 898 (Mo. App. S.D. 2000)

MO. SUPREME COURT RULE 74.04

VII. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because It Awarded Damages In Excess Of The Statutory Amount, In That The TCPA Provides For $500 For Each Facsimile Transmission, Not Each Page Transmitted.

47 U.S.C. § 227(b)(3)(B)

VIII. The Trial Court Erred In Denying Herz Financial's Motion For Summary Judgment, Because The Trial Court Relied On Inadmissible Opposing Affidavits, In That The Opposing Affidavits Failed To Comply With Supreme Court Rule 74.04(e) As The Opposing Affidavits Were Not Made On Personal Knowledge, The Opposing Affidavits Lack Foundation, And The Opposing Affidavits Rely On And Incorporate Irrelevant Hearsay.

New Prime, Inc. v. Professional Logistics, 28 S.W.3d 898 (Mo. App. S.D. 2000)

First Community Bank v. Western Sur. Co., 878 S.W.2d 887 (Mo. App. S.D. 1994)

J.S. DeWeese Co. v. Hughes Treitler Mfg. Corp., 881 S.W.2d 638 (Mo. App. E.D. 1994)

MO. SUPREME COURT RULE 74.04

ARGUMENT

Standard of Review

When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993) (internal citations omitted). Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the nonmoving party's response to the summary judgment motion. ITT, 854 S.W.2d at 376 (internal citations omitted). The Court accords the non-movant the benefit of all reasonable inferences from the record. ITT at 376. The review is essentially *de novo*. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court initially: that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Id. at 376-377. The trial court's judgment is founded on the record and the law, and the Court need not defer to the trial court's order granting summary judgment. Id. at 376.

I. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion for Summary Judgment, Because The TCPA Violates The First And

Fourteenth Amendments To The United States Constitution, In That The TCPA Is More Extensive Than Necessary To Serve Any Asserted Governmental Interest, The TCPA Does Not Directly Advance Any Asserted Governmental Interest, And The TCPA's Ban On Unsolicited Fax Advertisements Does Not Serve A Substantial Governmental Interest.

In Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), the United States Supreme Court recognized that the American consumer enjoys a constitutional right in the free flow of commercial information.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765. The "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard," Edenfield v. Fane, 507 U.S. 761, 766 (1993), vest both commercial solicitors and their consumer audience with free speech rights.

Regulations of commercial speech like the TCPA are valid under the First Amendment only if they satisfy the test of Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).[7] In this case, because the commercial speech at issue is truthful and concerns lawful activity, as admitted by Harjoe, only the latter three of Central Hudson's four requirements are at issue. (LF 572.) Thus, to withstand First Amendment challenge, the TCPA's ban on unsolicited fax advertising must:

(1) be "not more extensive than is necessary to serve" the interests asserted by the government,

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[7]In each of its recent commercial speech cases, the Supreme Court has suggested it is on the verge of adopting a test even more protective of commercial speech than the Central Hudson test. The Court has so far refrained from doing so, but only because the speech restrictions at issue in those cases were unconstitutional even under Central Hudson, so there was no need to make new law. Thompson v. Western States Medical Center, 122 S. Ct. 1497, 1504 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001); Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 184 (1999).

(2) "directly advance the governmental interest asserted," and

(3) serve a government interest that is "substantial."

Id. at 566. "It is well-established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Edenfield, 507 U.S. at 770. Where the government is not a party, the party proposing enforcement assumes the government's burden. See Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield at 770-71.

The trial court erred in determining that Harjoe has established any of these three requirements.

A. The TCPA's ban on unsolicited fax advertisements is more extensive than necessary because there are other ways of addressing unwanted faxes that would restrict much less speech.

If there are two alternative methods of addressing unwanted faxes, one of which restricts less commercial speech than the other, Central Hudson requires the government to choose the alternative that restricts less speech. As the Supreme Court held only last term, "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts

less speech, the Government must do so." Thompson v. Western States Medical Center, 122 S. Ct. 1497, 1506 (2002).

In Thompson, Congress had attempted to protect the public health by prohibiting the advertising of compounded drugs. The Court found the statute unconstitutional under Central Hudson, because there were alternative methods of protecting the public health that would have restricted less speech, such as limiting the quantity of compounded drugs a pharmacy could produce or sell, or prohibiting the use of commercial manufacturing equipment for compounded drugs. Thompson at 1506. "The Government has not offered any reason why these possibilities, alone or in combination, would be insufficient," the Court concluded. Id. "Nowhere in the legislative history of the [relevant statute] or petitioners' briefs is there any explanation of why the Government believed forbidding advertising was a necessary as opposed to merely a convenient means of achieving its interests." Id. at 1507. "If the First Amendment means anything," the Court held, "it means that regulating speech must be a last - not a first - resort. Yet here it seems to have been the first strategy the Government thought to try." Id. Because the statute at issue prohibited more commercial speech than was necessary to achieve the goal of protecting the public health, it was unconstitutional under Central Hudson.

Thompson emphatically confirms the First Amendment principle that if there are two methods of addressing an issue, the government must either choose the alternative that restricts less commercial speech or prove that the

less restrictive alternative would not work as well. See also Rubin v. Coors Brewing Co., 514 U.S. 476, 490-91 (1995) (finding a restriction on beer advertising unconstitutional under Central Hudson because of the availability of options that would restrict less commercial speech).

One obvious alternative is contained in the TCPA itself, in the regulatory scheme the TCPA provides for telemarketing. See 47 U.S.C. § 227(c)(5). Under the TCPA, a person who receives a second telemarketing call from the same entity within a 12-month period after requesting no further calls may sue. 47 U.S.C. § 227(c)(5). It is an affirmative defense to any such action, however, that the defendant has established and implemented procedures to prevent such calls. 47 U.S.C. § 227(c)(5); see also 47 C.F.R. § 64.1200(e)(2). This scheme balances the interests of people who want to receive commercial phone calls with the interests of people who do not, and allows advertisers to communicate information valued by the first group without unduly bothering the second.

A similar scheme for fax advertising is just as feasible and would protect the free-speech interests of advertisers and consumers alike. Many people ***want*** to receive unsolicited restaurant coupons, offers of discount travel, and the like on their fax machines. If fax advertising was as uniformly despised as the TCPA's blanket ban suggests, the fax advertising industry would have died a natural death long ago.

Indeed, uninvited commercial solicitation—by fax or otherwise—plays an important role in our marketplace. As the Supreme Court recognizes, such solicitation

> may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact.

Edenfield, 507 U.S. at 766. "In particular," the Court observed, "with respect to nonstandard products like the professional services offered by CPA's, these benefits are significant." Id. The same is true of the nonstandard products offered, via fax, by restaurateurs and travel agents. Just as "one man's vulgarity is another's lyric," Cohen v. California, 403 U.S. 15, 25 (1971), one person's "junk fax" is another's valuable commercial information.

Congress never explained why its scheme for telemarketing would not work equally well for fax advertising. It never explained why banning fax advertising altogether "was a necessary as opposed to merely a convenient means of achieving its interests." Thompson, 122 S. Ct. at 1507.

Another obvious alternative to a complete ban on unsolicited fax advertising would be to set up a "no-fax" list, a database of fax numbers belonging to people who do not wish to receive unsolicited faxes. Signing up for the list would be as simple as checking a box on a form or a website, or dialing a toll-free phone number. Once a given fax number was on the list, it would be unlawful to send an unsolicited fax to that number. The cost to establish and maintain the list could be charged to fax advertisers in exchange for access. A "no-fax" list would shield unwilling recipients but restrict substantially less speech than the TCPA, because it would allow recipients who welcome unsolicited commercial offers via fax to keep receiving them.

A "no-fax" list is hardly a utopian concept. At least 22 states currently have, or are now establishing, "no-call" lists - databases of telephone numbers of people who do not wish to receive telemarketing

calls.[8] The Federal Trade Commission and FCC have recently proposed creating a nationwide "no-call" list, financed by user fees paid by telemarketers. 67 Fed. Reg. 4492 (Jan. 30, 2002); 67 Fed. Reg. 37,362 (May 29, 2002); In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 2002 FCC Lexis 4578, at 11.

These "no-call" lists have been extremely successful. Missouri's list, for example, took effect on July 1, 2001, and grew to one million telephone

[8]Ala. Code § 8-19C-3 (2002); Alaska Stat. Ann. § 45.50.475 (2001); Ark. Code Ann. § 4-99-404 (2001); Cal. Bus. & Prof. Code § 17591 (2002), updated by 2002 Cal. Legis. Serv. CH. 698 (S.B. 1560) (West); Colo. Rev. Stat. § 6-1-901 *et seq.* (2002); Conn. Gen. Stat. Ann. § 42-288a (West 2002); Fla. Stat. Ann. § 501.059 (West 2002); Ga. Code Ann. § 46-5-27 (2002); Idaho Code § 48-1003A (Michie 2002); Ind. Code Ann. § 24-4.7 (2002); 2002 Kan. Sess. Laws 179; Ky. Rev. Stat. Ann. § 367.46955(15) amended by 2002 Kentucky Laws Ch. 21 (H.B. 47); La. Rev. Stat. Ann. § 45:844.13 (West 2002); 2002 Minn. Chapter Laws 367; Mo. Rev. Stat. § 407.1098 (2001); N.Y. Gen. Bus. Law § 399-z (McKinney 2002); Or. Rev. Stat. § 646.574 (2001); Tenn. Code Ann. § 65-4-405 (2001); Tex. Bus. & Com. Code Ann. § 43.101 (2001); 2002 Vt. Laws 120; Wis. Stat. § 100.52 (2001); Wyo. Stat. Ann. § 40-12-302 (Michie 2002).

numbers, representing approximately 2.5 million people, just one year later. Missouri's Attorney General noted in a celebratory press release that not only were Missourians now dining in peace, but complaints of telemarketing fraud had been cut in half. See Press Release, Missouri Attorney General's Office, Missouri No Call Tops 1 Million Three Days Before One-Year Anniversary of Law, Nixon Announces (June 28, 2002), available at http://www.ago.state.mo.us/062802.htm (last visited October 2, 2002). Registering for the list is free, because the cost is recovered from telemarketers, who pay $25 per area code per quarter. See Missouri Attorney General's Office, Missouri No Call Law: FAQs for Telemarketers, at http://www.ago. state.mo.us/telemarketerfaqs.htm (last visited October 2, 2002).

If "no-call" lists work to curb unwanted telemarketing, a similar list can be established for fax advertising. Both are simply lists of telephone numbers. With respect to telemarketing, Missouri's Attorney General advises that "[m]any Missourians enjoy receiving calls at home about products or services. But the choice is yours." See Missouri Attorney General's Office, Reduce Telemarketing Calls, at http://www.ago.state.mo. us/phonefra.htm (last visited October 2, 2002). The same is true of faxes. A "no-fax" list would allow interested recipients to keep receiving unsolicited faxes, while accommodating those who object to them. Cf. Thompson, 122 S. Ct. at 1503 ("the general rule is that the speaker and the audience, not the government, assess the value of the information presented"); Rowan v.

United States Post Office Dept., 397 U.S. 728, 737-38 (1970) (federal statute prohibiting mail advertisers from sending mail to householders who have asked not to receive it did not violate First Amendment only because the statute gave the choice to the householder rather than the government). A "no-fax" list would thus restrict much less commercial speech than the TCPA.

This concept was already familiar when Congress enacted the TCPA. The three House bills preceding the TCPA all included versions of a "no-fax" list. Congress never explained why this idea was dropped in favor of a ban on unsolicited fax advertising. Cf. Thompson, 122 S. Ct. at 1507. The TCPA itself authorized the FCC to consider whether to implement a nationwide "no-call" list for telemarketers. But neither the statute nor the legislative history gives any hint as to why a "no-call" list would be effective but a "no-fax" list would not.

State regulations of fax advertising illustrate two other less restrictive alternatives:

- in Colorado, Minnesota, Oregon, Rhode Island, and Tennessee, fax advertisers are required to maintain their own "no-fax" lists. The details of the statutes vary, but in general, unsolicited fax advertisements must contain

a telephone number or address where recipients can indicate their desire not to receive such faxes.[9]

- in New York, North Dakota, and Wisconsin, unsolicited faxes are subject to short page limits, and must be received between 9 p.m. and 6 a.m., to cause the least inconvenience during business hours.[10]

Both of these regulatory schemes restrict substantially less speech than the TCPA does, but there is absolutely no indication in the legislative history that Congress even considered them, much less determined they were not feasible. As in Thompson, "regulating speech must be a last - not a first - resort. Yet here it seems to have been the first strategy the Government thought to try." Thompson, 122 S. Ct. at 1507. Because there are obvious alternatives to the TCPA's fax ban that would restrict substantially less speech and yet serve the government's interests equally well, the TCPA fails the Central Hudson test. Id. Cf. Missouri, 196 F. Supp. 2d at 932

[9]Colo. Rev. Stat. § 6-1-702(b) (2002); Minn. Stat. § 325E.395 (2001); Or. Rev. Stat. § 646.872 (2001); R.I. Gen. Laws § 6-47-1 (2001); Tenn. Code Ann. § 47-18-2501(a) (2001).

[10]N.Y. Gen. Bus. Law § 396-aa(1) (2002); N.D. Cent. Code § 51-07-23 (2001); Wis. Stat. § 134.72 (2001).

(recognizing a variety of less restrictive alternatives in striking down the TCPA's no-fax provision).

Because Harjoe failed to show that the TCPA is "not more extensive than necessary," Central Hudson, 447 U.S. at 566, the ban on unsolicited fax advertising violates the First Amendment. Therefore, the trial court erred in granting Harjoe's Motion for Summary Judgment and in denying Herz Financial's Motion for Summary Judgment.

B. The TCPA's ban on unsolicited fax advertisements does not directly advance the government's asserted interests in shielding recipients from the cost and inconvenience of unwanted faxes.

To satisfy the Central Hudson standard, Harjoe must establish that the TCPA's ban on unsolicited fax advertising "directly and materially advances the asserted governmental interest." Greater New Orleans, 527 U.S. at 188. Harjoe can satisfy this burden only with *facts*, not "by mere speculation or conjecture." Id.

1. Because the TCPA's distinction between commercial and noncommercial faxes bears no relationship whatsoever to the government's interest in shielding recipients from unwanted faxes, the TCPA is unconstitutional under Discovery Network.

Here, there is no dispute as to what the governmental interest is: Congress sought to prevent the senders of unwanted faxes from tying up

recipients' fax machines and from shifting the costs of those faxes to recipients. But the TCPA does not address the problem of unwanted faxes; it prohibits only unwanted ***commercial*** faxes. The costs shifted by unsolicited faxes, and the extent to which unsolicited faxes tie up the recipient's machine, are the same whether those faxes contain advertisements or whether they contain newsletters, charitable solicitations, or political campaign messages. Yet neither the legislative history of the TCPA nor the legal file in this appeal explains why Congress distinguished between commercial and noncommercial speech.

In this respect, the TCPA is identical to the regulation the Supreme Court found unconstitutional in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). To advance its interest in ameliorating "visual blight" created by newsracks, Cincinnati banned newsracks containing advertisements, but not newsracks containing newspapers, even though the newsracks containing advertisements were no uglier than the newsracks the city allowed to remain. Id. at 425. The Court struck down this regulation under Central Hudson, because of the lack of any connection between the city's aesthetic interest and the distinction between commercial and noncommercial speech. "[T]he distinction bears no relationship ***whatsoever*** to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests." Id. at 424 (emphasis in original). The holding of Discovery Network is that regulation cannot distinguish between commercial and

noncommercial speech unless the government can show that commercial speech poses a problem that noncommercial speech does not.

In the TCPA, Congress singled out faxes containing advertisements just the way Cincinnati singled out newsracks containing advertisements. Just as the city's newsracks were equally ugly whether they contained advertisements or newspapers, unwanted faxes are equally prone to shift costs to their recipients, and to tie up recipients' machines, whether those faxes contain advertisements or something else. As in Discovery Network, the distinction between commercial and noncommercial faxes bears no relationship whatsoever to the government's interest in preventing the harms caused by unwanted faxes. The legislative history contains absolutely no evidence that either cost-shifting or the occupation of recipients' machines is a greater problem when an unwanted fax contains an advertisement. Nor did Harjoe introduce any such evidence in the trial court below. As in Discovery Network, therefore, Harjoe cannot establish that the TCPA "directly and materially advances" its interest as required by Central Hudson. See Lysaght v. New Jersey, 837 F. Supp. 646, 651-52 (D.N.J. 1993) (striking down, under Discovery Network, a state law prohibiting prerecorded ***commercial*** telephone messages, but not prerecorded ***noncommercial*** telephone messages, because the commercial/ noncommercial distinction had nothing to do with the extent to which the calls disrupted residential privacy).

2. The TCPA does not directly advance the goal of shielding consumers from the cost and inconvenience of advertising, because it irrationally prohibits only one kind of advertising while allowing others that are even more prone to shift costs and cause inconvenience.

The TCPA's irrational statutory scheme fails to satisfy Central Hudson's requirement that the TCPA ***directly*** and ***materially*** advance the government's interest in shielding consumers from the cost and inconvenience of advertising. See Greater New Orleans, 527 U.S. at 188. Because the TCPA provides only "ineffective or remote support for the government's purpose," it violates the First Amendment. Id. (quoting Central Hudson, 447 U.S. at 564).

The Supreme Court has made clear that a commercial speech restriction will fail under Central Hudson if it is "pierced by exemptions and inconsistencies." Id. at 190. Such was the fate, for example, of the federal statute at issue in Greater New Orleans, a statute that banned television and radio advertising of lotteries and casino gambling. The statute exempted state-run lotteries and casinos operated by Indian tribes. The statute did not prohibit advertising in media other than radio and television. The Court held that the statute was so riddled with inconsistencies that it did not "directly and materially advance" the government's interest in reducing the social costs of gambling, because it banned advertising in some media but not

others, and because it banned advertising of some forms of gambling but not others. Id. at 190-91.

Such was also the fate of the federal statute at issue in Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), which banned advertisements that disclosed the alcohol content of beer. The Court held that the statute did not directly and materially advance the government's interest in preventing "strength wars" among brewers, "because of the overall irrationality of the Government's regulatory scheme." Id. at 488. The advertising prohibition applied only in certain states, and did not apply to wine and spirits, for which the danger of "strength wars" was at least as great. Id. at 488-89. The Court concluded that "the irrationality of this unique and puzzling regulatory framework" caused it to fail this prong of the Central Hudson test. Id. at 489.

The TCPA fails the Central Hudson test for the same reason. The TCPA bans unsolicited fax advertising, but permits unsolicited telephone advertising, even though:

—telephone advertising is by far the greater intrusion. The vast majority of telemarketing calls are to residences, while the vast majority of commercial faxes are sent to businesses, which is where 99% of fax machines are located. A ringing phone commands the recipient to interrupt what she is doing and answer it immediately, while a fax can be received without interruption and read later. No one has to get up from the dinner table to answer the fax machine. The TCPA's ban on fax advertising, then,

is an utterly irrational way of shielding consumers from the intrusion caused by advertising. See generally, Missouri *ex rel* Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920, 926-27 (E.D. Mo. 2002) ("Missouri").

—telephone advertising is more costly to the recipient than fax advertising. As explained below (in section C), the recipient of a fax pays a few pennies for paper and toner, if the fax is printed. The amount of time it takes to read and discard a fax is negligible. Telephone advertising imposes no costs in paper or toner, but it imposes costs on the recipient's time that easily exceed the few pennies it costs to receive a fax. If a professional or skilled craftsman who charges $100 per hour spends three minutes listening to a sales pitch and trying to terminate a call, he has wasted $5 worth of time, an amount approximately equal to the cost of receiving and printing 100 faxes. The TCPA makes no sense as a way of reducing the "cost-shifting" associated with advertising. Id.[11]

[11]The TCPA's more favorable treatment of telemarketers at the expense of fax advertisers is especially striking when one considers that Congress heard extensive evidence about the size of the telemarketing industry and the magnitude of the inconvenience it causes to consumers, but no evidence whatsoever about the size of the fax advertising industry or the extent to which consumers object to receiving commercial faxes.

The irrationality of the TCPA's statutory scheme is compounded by its exemptions for some varieties of unsolicited fax advertising. Faxed advertisements of job openings, for example, are not prohibited by the TCPA. Lutz Appellate Services, Inc. v. Curry, 859 F. Supp. 180, 181-82 (E.D. Pa. 1994). Faxed "image" advertisements – advertisements that seek to increase a company's name recognition but do not explicitly offer a product for sale – are not prohibited by the TCPA. Faxed advertisements seeking donations to non-profit organizations or political campaigns are not prohibited by the TCPA, even if they are sent by for-profit fax advertising firms. Faxed advertisements to recipients with whom the sender has an established business relationship are not prohibited by the TCPA, even if the recipient has not consented to receive such faxes. See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 1992 FCC Lexis 7019, § 54. Yet, these permitted forms of fax advertising shift the same costs to the recipients as the forms of fax advertising the TCPA prohibits.

The TCPA is thus at least as irrational, and at least as "pierced by exemptions and inconsistencies," as the statutes the Supreme Court found unconstitutional in Greater New Orleans and Rubin. Cf. Missouri, 196 F. Supp. 2d at 931-932.

The Supreme Court requires commercial speech restrictions to "directly and materially advance" the asserted governmental interest to ensure that the ostensible purpose of the statute is not a pretext for some

other motive. As the Court has explained many times, "this requirement is critical; otherwise, [the government] could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." Greater New Orleans, 527 U.S. at 188 (citations omitted). The TCPA is a perfect example of the need for this requirement. The inconsistencies of the TCPA demonstrate that the statute was motivated by more than just a concern for the cost and inconvenience imposed on the recipients of advertising. The statute's disparate treatment of faxing and telemarketing is an irrational way of advancing that interest. It is a quite rational method, however, of sheltering established telemarketers from the competitive threat posed by fax advertising.

C. The TCPA's ban on unsolicited fax advertisements does not serve a substantial governmental interest.

Under Central Hudson, Harjoe must prove that the TCPA's restriction on commercial speech serves "a ***substantial*** interest." Central Hudson, 447 U.S. at 564 (emphasis added). "This burden is not satisfied by mere speculation or conjecture." Rather, Harjoe must "demonstrate that the harms [the government] recites are real." Edenfield, 507 U.S. at 770-71.

There is no dispute in this case that when Congress banned unsolicited fax advertising, it was ostensibly trying to prevent two kinds of perceived harm: (1) the harm caused when unwanted faxes occupy recipients' machines, preventing users from sending or receiving other faxes; and (2)

the harm caused by the cost to the recipient of the paper and toner used to print unwanted faxes. These are the only two government interests identified in the legislative history. Under Central Hudson, a reviewing court may not supplant these interests with others. Edenfield, 507 U.S. at 768.

These interests were not substantial in 1991, when Congress enacted the TCPA, and they are even more insubstantial today. Because of advances in technology, unwanted faxes do not prevent people from using their fax machines, and the cost of receiving unwanted faxes is so low as to be *de minimis*.

1. The government's interests are weighed as of today, not as of 1991 when the TCPA was enacted.

Harjoe bears the burden of proving that unsolicited fax advertisements, if lawful, would cause substantial harm ***today***. In commercial speech cases, as in all constitutional cases, the government "cannot turn the clock back" to justify the constitutionality of a statute by asserting an interest that no longer exists. Brown v. Board of Education, 347 U.S. 483, 492 (1954).

In Discovery Network, for example, Cincinnati tried to ban commercial newsracks based on "an outdated prohibition against the distribution of any commercial handbills on public property," a prohibition "enacted long before any concern about newsracks developed." 507 U.S. at

417. The Court held that the city's outdated interest in preventing littering could not justify its ban on commercial newsracks. Id. In Greater New Orleans, which involved the constitutionality of a 1934 statute, the Court likewise refused to permit the government to justify the statute by relying on the fact that in 1934 it was Congress's policy to discourage gambling. "Whatever its character in 1934," the Court noted, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." 527 U.S. at 187. The Court then evaluated the constitutionality of the statute with reference to federal gambling policy ***today***, not federal gambling policy in 1934. Id. at 188-94.

The logic of such a rule is apparent. If the government were permitted to assert an interest that no longer exists, the government might today incarcerate Japanese-Americans pursuant to a 1942 statute, on the ground that there was a compelling interest to do so in 1942. Cf. Korematsu v. United States, 323 U.S. 214 (1944).

2. There is no evidence that unwanted faxes prevent people from using their fax machines.

The purported harm of unwanted faxes tying up fax machines is not a "real" problem. Today, faxes are received in a matter of seconds. Missouri, 196 F. Supp. 2d at 929, n.19. Additionally, all but the most ancient fax machines have features that enable their users to work productively even while a fax is being received.

—Fax machines are increasingly linked to ***computer networks***, which enable people to send and receive faxes on their computers, without walking to the fax machine or waiting at all. (LF 81.)

—Fax machines have ***memory***, which allows a machine to scan a document, store it until the phone line is free of incoming faxes, and then send it automatically. Memory also allows the machine to store incoming faxes while printing others, and to store incoming faxes when the machine runs out of paper. (LF 80.)

—Many fax machines have ***dual access***, which allows a machine to send one fax and receive another simultaneously. (LF 80.)

—Fax machines have ***number blocking***, which allows users to instruct the machine not to accept faxes from particular numbers. (LF 81.)

The vast majority of faxes are received without impeding recipients' productivity in the slightest. In those instances where recipients are slowed down by an unwanted fax, the delay is merely a matter of seconds. Cf. Missouri, 196 F. Supp. 2d at 926-27.

Even in 1991, when Congress enacted the TCPA, there was no evidence of a real problem with unsolicited faxes tying up fax machines. Congress heard a few anecdotes about fax machines being tied up by unsolicited faxes, but there was no evidence before Congress as to how often this happened. See Missouri, 196 F. Supp. 2d at 929. The testimony at the hearings—the only "evidence" Congress had before it—was not evidence at all, but rather the unsupported opinions of witnesses as to the need for

regulation. Opinions, however, no matter how strongly advanced, will not satisfy the government's burden of proof. Edenfield, 507 U.S. at 770-71. Because the record below does not establish that there actually *is* any substantial harm taking place, Harjoe has not sustained his burden.

3. The cost of receiving an unwanted fax is so low as to be *de minimis*.

Many kinds of advertising impose real monetary costs on their recipients. Unsolicited mail constitutes a substantial percentage of the trash hauled away each day from homes and offices. Everyone pays for that trash to be collected, in the form of higher local taxes, higher maintenance fees, or higher rents, and that does not include the value of the time spent opening, reading, and discarding unsolicited mail. It also takes time to deal with unsolicited telemarketing calls to businesses and homes. Because time is money, these forms of advertising impose very real costs. Indeed, it takes much more time to wade through a typical day's unwanted mail, or to extricate oneself from a telemarketing call, than it takes to read – or just discard – a fax advertisement. See generally, Missouri, 196 F. Supp. 2d at 926-27.

These examples show that there must be some point at which those costs are so low that they cannot justify the suppression of speech. The cost imposed by unwanted mail would never be thought sufficient to allow the government to prohibit all commercial mailings. See Bolger v. Youngs

Drug Products Corp., 463 U.S. 60, 72 (1983) ("the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned") (citation omitted). The same must be true of fax advertising. There must be a point at which the cost of receiving an unwanted fax is simply too low to allow the government to prohibit unsolicited fax advertisements altogether. Under Central Hudson, therefore, Harjoe must prove that the cost of receiving unwanted faxes is more than *de minimis*. Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 505 (1996) (plurality opinion) (requiring the state to prove that a price advertising ban will reduce alcohol consumption "significantly," *i.e.*, by more than a *de minimis* amount).

This Harjoe failed to prove. While faxes once were relatively expensive to receive because they had to be printed on special paper, that is no longer the case. While the precise cost of paper and toner necessary to print a faxed page depends on the machine and how much the user pays for supplies, the range of estimates varies from approximately 2 to 6.5 cents per page, and more only for pages that use exceptionally large amounts of toner. See Missouri, 196 F. Supp. 2d at 923, 926.

At pennies per page, the cost of an unwanted fax is currently comparable to, or less than, the cost of receiving a telemarketing call or disposing of direct mail. Further, the cost of receiving faxes is constantly declining as more and more faxes are received on computers and thus need not be printed at all. On any view of the matter, these costs are *de minimis*.

The harms the TCPA purports to ameliorate are not "real" and "substantial." Accordingly, the TCPA fails this prong of the Central Hudson test. For this reason as well, the TCPA is unconstitutional.

D. The Eastern District of Missouri's decision in Missouri *ex rel.* Nixon v. American Blast Fax, Inc. should be followed because it is the only federal court opinion to apply the Central Hudson standard correctly in a TCPA case.

Advertising is not always welcomed, but the fact "that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985). For all its faults, advertising is the primary way consumers obtain information about the prices and availability of the things they buy. For that reason, the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Virginia Bd. of Pharmacy, 425 U.S. at 763. Even when commercial information is carried by fax, the right to send it and receive it is protected by the First Amendment, just as much as when it is carried by any other medium. A restriction on fax advertising, then, must be scrutinized under Central Hudson just as rigorously as any other restriction on commercial speech. When the TCPA's restrictions on commercial speech are scrutinized as the Constitution requires, there can be no doubt that they fail to pass constitutional muster.

Indeed, this was precisely the conclusion reached by the United States District Court for the Eastern District of Missouri in the Missouri case, when it carefully scrutinized the TCPA in this fashion. (A9-A20).[12] The Missouri court struck down the TCPA because the court found that the government had not satisfied its burden on ***any*** of the Central Hudson requirements. Missouri, 196 F. Supp. 2d 920.[13]

First, the Missouri court held that the government had not established the existence of a "substantial governmental interest" in banning unsolicited fax advertisements. Id. at 928-31. The court noted that the government had claimed two such interests: preventing fax advertisers from shifting monetary costs to recipients, and preventing fax advertisers from tying up recipients' fax machines. Id. at 928. After examining the legislative history of the TCPA, the court concluded that Congress lacked any evidence of the actual cost to recipients of receiving unsolicited faxes or the actual amount of time unsolicited faxes occupied recipients' machines. Id. at 929. Nor, the

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[12]State of Missouri *ex rel.* Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002). Where even a lower federal court's construction of a federal statute is available, Missouri Courts should "look respectfully to such opinions for such aid and guidance as may be found therein." Hanch v. K.F.C. National Management Co., 615 S.W. 2d 28, 33 (Mo. banc 1981).

[13]This decision is currently on appeal in the United States Court of Appeals for the Eighth Circuit.

court added, had the government introduced any such evidence at the hearing. Id. The court found that defendant had introduced evidence suggesting that both costs, in money and time, had become *de minimis* because of advances in fax technology. Id. "The Court does not need to decide if defendant's assertions are correct because the government has the burden to prove that it has a substantial interest," the court reasoned. Id. at 929-30. "It must prove that the harm it is trying to prevent is real and that a serious problem does in fact exist." Id. at 930 (citing Edenfield, 507 U.S. at 770-71). The court accordingly "question[ed] whether the government has met its burden in showing that there was a substantial interest at the time of enacting the TCPA, and whether there is a substantial interest at the present time." Id. at 931.

The Missouri court next found that the government failed to demonstrate that the TCPA's ban on fax advertising "directly advances" the government's interest in preventing cost-shifting:

> The TCPA does not ban all unsolicited faxes but rather only advertisements. Therefore, recipients can still bear the costs of printing others' messages, even if they strongly oppose the messages' content. The costs of printing political messages, jokes, and even some advertisements which are not included within the TCPA's definition, still fall upon the recipient.

Id. at 931. The court concluded that "[t]here is no evidence as to what type of unsolicited faxes are causing the harm which the government is trying to alleviate, so the Court cannot assess whether the regulation directly advances the government's interest." Id. at 932.

Finally, on the last prong of the Central Hudson test, the Missouri court held that the government had failed to establish that the TCPA does not "burden substantially more speech than is necessary." Id. (quoting Board of Trustees v. Fox, 492 U.S. 469, 478 (1989)). Like Herz Financial here, the Missouri "[d]efendants offer[ed] a variety of alternatives, including a national 'no-fax' database similar to those being utilized for telephone solicitations." Id. Such a database "would promote the government's interest," the court found, "and yet be less intrusive to First Amendment rights." Id. at 932-33. The court added that "[m]any states have looked at this problem and found less restrictive means than a complete ban on unsolicited fax advertisements." Id. at 933.

The Missouri Court accordingly held that the TCPA's ban on unsolicited fax advertising violates the First Amendment. Id. at 933-34. This holding, and the careful, reasoned application of Central Hudson and

analysis of the TCPA by which the Missouri court reached its decision, should guide the court here.[14]

The other federal courts to assess the constitutionality of the TCPA's ban on unsolicited fax advertising are flawed and should not be followed because they incorrectly apply the Central Hudson standard. See Missouri, 196 F. Supp. 2d at 930-31. For example, in Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995), the Court of Appeals for the Ninth Circuit held that the TCPA's ban on unsolicited fax advertising satisfies the Central Hudson standard. That decision, however, is fraught with analytical defects and should not be followed.

In Destination Ventures, the Ninth Circuit ignored one of the Central Hudson prongs discussed above, and misapplied the other two. First the Ninth Circuit misapplied the "substantial interest" prong. The Ninth Circuit summarily concluded that the government has a substantial interest in preventing cost-shifting without examining the evidence before Congress or the facts at the time the case was decided. 46 F.3d at 56. In so doing, the court abdicated its "obligation to exercise independent judgment when First

[14]Just a few weeks ago, a New York state court adopted the Missouri court's reasoning and held that the TCPA violates the First Amendment. Rudgayzer & Gratt v. Enine, Inc., No. 32527/01 (Civ. Ct. of N.Y., Kings Cty., Sept. 30, 2002).

Amendment rights are implicated," to insure that "Congress has drawn reasonable inferences based on substantial evidence." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666 (1994); see also Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 195 (1997). Such passive deference to Congress is clearly precluded by the Supreme Court's holding in Edenfield—decided two years before Destination Ventures—that the government must ***prove*** that "the harms it recites are real," and that this burden "is not satisfied by mere speculation or conjecture." Edenfield, 507 U.S. at 770-71. See also North Olmsted Chamber of Commerce v. City of North Olmsted, 86 F.Supp.2d 755, 770 (N.D. Ohio 2000) (each element of the Central Hudson test must be applied thoroughly, without presuming that any element had been satisfied, and with "a bite.").

The Ninth Circuit, moreover, assessed the substantiality of the harm by looking "at the problem as it existed when Congress enacted the [TCPA]." Destination Ventures, 46 F.3d at 57. Again, this view ignores Supreme Court precedent which holds that, in this age of rapid technological progress, the Government should "readjust its views and emphasis in light of modern knowledge." Bolger, 463 U.S. at 71 (citations omitted) (permitting the government to rely on interests not asserted at the time of a statute's passage because the 19th Century justifications were insufficient); Greater New Orleans, 527 U.S. at 187 (rejecting interest based on outdated judgment of gambling's social value).

Second, the Destination Ventures court misapplied the "directly and materially advances" prong of Central Hudson. Like Herz Financial here, the advertiser in Destination Ventures argued that Discovery Network prevented the government from drawing a content-based distinction between commercial and noncommercial faxes when doing so bears no relationship whatsoever to the government's interest in preventing the harms allegedly caused by unsolicited faxes. The Ninth Circuit rejected the argument, however, because it accepted the erroneous premise that "Congress's goal was to prevent the shifting of ***advertising*** costs" to consumers, rather than the shifting of the costs associated with unsolicited faxes generally. Destination Ventures, 46 F.3d at 56 (emphasis added).[15] When Congress's goal is redefined so narrowly, of course, the means-end fit of a ban on unsolicited fax advertising no longer runs afoul of Discovery Network. But one can make ***any*** statute a perfect fit by artificially narrowing the legislature's goal to match what the statute accomplishes. See Simon & Schuster, 502 U.S. at 120 (1991) ("If accepted, this sort of circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored.").

The point of Discovery Network, however, and the point the Ninth Circuit completely missed in Destination Ventures, is that Congress cannot

[15]It is clear from the opinion that the Ninth Circuit used "advertising" to mean commercial advertising.

distinguish between commercial and noncommercial faxing without having a sound reason for drawing the distinction. Cincinnati could not save its newsrack regulation by claiming it was interested only in the aesthetic problems of ***commercial*** newsracks, when commercial and noncommercial newsracks were equally ugly. The Ninth Circuit thus erred in trying to save the TCPA by supposing that Congress was interested only in the cost-shifting caused by unwanted commercial faxes, when an unsolicited fax shifts costs regardless of whether it contains a commercial or noncommercial message.

The Ninth Circuit also wrongly distinguished Discovery Network on the ground that commercial faxes, at least according to the Ninth Circuit's speculation, are responsible for the "bulk" of cost-shifting. See 46 F.3d at 56. Discovery Network, however, relied not on the number of newsracks in each category but on the lack of any relationship between the city's aesthetic interests and the distinction between commercial and noncommercial speech. See 44 Liquormart, 517 U.S. at 503. Discovery Network would thus have come out the same way whether commercial newsracks were a small or a large percentage of the total number. See Discovery Network, 507 U.S. at 428 ("Because the distinction Cincinnati has drawn has

absolutely no bearing on the interests it has asserted, . . . the city has not established the 'fit' between its goals and its chosen means.").[16]

The Ninth Circuit's distinction fails for the additional reason that it just assumed this "fact" notwithstanding that Congress had no evidence when it enacted the TCPA that unsolicited ***commercial*** faxes actually are responsible for the bulk of cost-shifting. Congress simply had no idea what percentage of unsolicited faxes contain advertisements and Central Hudson does not allow Congress—or Harjoe here—to guess or speculate on that score. Even on the Ninth Circuit's mistaken interpretation, then, Discovery Network cannot be distinguished from this case.

Finally, the Ninth Circuit in Destination Ventures overlooked Central Hudson's requirement that the TCPA be "not more extensive than is necessary to serve" the interests asserted by the government. The court's truncated, six-paragraph analysis of the First Amendment challenge includes no discussion of whether alternative methods of regulation, such as a "no-fax" list, would serve the government's interest equally well while prohibiting much less commercial speech.

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[16]This conclusion is bolstered by the fact that in Discovery Network, it was not clear whether commercial or non-commercial newsracks were more prevalent, in that the Court said only that noncommercial newsracks were "arguably" more prevalent. 507 U.S. at 426.

These flaws are compounded by the Ninth Circuit's extensive reliance upon United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), in which the Supreme Court upheld a statute regulating advertising of otherwise illegal gambling. The Supreme Court, however, has since determined that Edge does not apply to statutes like the TCPA. In 44 Liquormart, Justice Stevens rejected the application of Edge to a ban targeting "information about entirely lawful behavior" such as the ban presented by the TCPA. See 44 Liquormart, 517 U.S. at 508-509. Because Edge Broadcasting is inapplicable, the Ninth Circuit's reliance on that decision is misplaced.

Two federal district courts, in erroneous reliance on Destination Ventures, also held that the TCPA is constitutional prior to the Missouri decision.[17] The district court in Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1161 (S.D. Ind. 1997), simply parroted the flawed reasoning of Destination Ventures and never addressed the issue of whether a substantial governmental interest existed to support the TCPA. Kenro, 962 F. Supp. at 1167. Instead, Kenro dealt only with the question of whether the TCPA was "narrowly tailored to achieve Congress' purpose." Id. Like the court in

[17]Another District Court *sua sponte* questioned the constitutionality of the TCPA under the Central Hudson standard, but that court did not address the issue, because the parties had not raised it. Lutz Appellate Services, Inc. v. Curry, 859 F. Supp. 180, 182 (E.D. Pa. 1994).

Destination Ventures, the Kenro court accepted Congress's bald conclusions without undertaking any analysis of the evidence in the congressional record, the reality of fax advertising at the time of the decision or whether the then current state of affairs supported the TCPA's restrictions on fax advertising. Id. at 1168. Thus, Kenro is just as defective as Destination Ventures.

The district court's analysis in State of Texas v. American Blast Fax, 121 F. Supp. 2d 1085, 1090-92 (W.D. Tex. 2000), is even more truncated than the fatally flawed analyses of the Destination Ventures and Kenro courts. Beginning with the observation that "commercial speech occupies a 'subordinate position in the scale of First Amendment values,'" the court simply parroted the reasoning of Destination Ventures and Kenro. American Blast Fax, 121 F. Supp. 2d at 1091-92. The court then summarily rejected the defendant's First Amendment challenge and failed to conduct any independent analysis of the governmental interests supporting the TCPA or

to scrutinize the Act's Congressional record. Like the others on which it rests, this decision too is unpersuasive.[18]

When the TCPA's no-fax provision is analyzed under Central Hudson in the way the Supreme Court demands, it is clear that this statutory provision is infirm under the First Amendment.

II. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion For Summary Judgment, Because The TCPA Violates The Fifth and Fourteenth Amendments To The United States Constitution, In That The TCPA Fails To Give Potential Fax Senders Adequate Warning Of The Conduct The Act Proscribes And, Therefore, The Act Is

[18]In a more recent, unpublished decision, Minnesota v. Sunbelt Communications, 2002 WL 31017503 (D. Minn. 2002), the court not only tracked the mistakes of Destination Ventures and its progeny, but also ignored the Supreme Court's most recent commercial speech decisions - Thompson and Lorillard - in preliminarily finding without any evidentiary hearing that a First Amendment challenge to the TCPA had no likelihood of success.

Unconstitutional Under the Void-For-Vagueness Doctrine.

The statutory provisions of the TCPA are ambiguous and fail to give potential fax senders adequate warning of the conduct the Act proscribes. As such, the Act is impermissibly vague and is unconstitutional under the void-for-vagueness doctrine.

The void-for-vagueness doctrine forbids enforcement of a law containing "'terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984), quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). Legislative enactments must articulate terms "with a reasonable degree of clarity" to reduce the risk of arbitrary enforcement and to allow individuals to conform their behavior to the requirements of the law. Id. While the doctrine finds its roots in criminal law, it also applies to civil statutes. A. B. Small Co. v. American Sugar Refining Co., 267 U.S. 233 (1925) (rejecting a proposed doctrinal distinction between criminal and civil cases).

The vagueness doctrine springs from three basic policies. First, people are free to steer between lawful and unlawful conduct, such that laws must give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). Second, if arbitrary and discriminatory

enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy judgments to judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Id. Finally, a vague statute may chill the exercise of First Amendment freedoms, as fear of prosecution may cause people to refrain from lawful speech simply because they cannot readily discern from the statutory language whether their speech is unlawful. Id.

Thus, the United States Supreme Court has determined that the vagueness doctrine applies with particular rigor when the statute at issue regulates protected expression. "If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply." Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, reh'g. denied, 456 U.S. 950 (1982) (footnote omitted); Grayned, 408 U.S. at 109 ("Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'").

From these principles it necessarily follows that the TCPA, which regulates expression protected under the First Amendment, must be scrutinized to determine whether the language conveys sufficiently definite warning as to what is forbidden. Connally v. General Constr. Co., 269 U.S. 385 (1926). The TCPA's provision banning all commercial faxes cannot pass this test.

The TCPA defines the term "unsolicited advertisement" as "***any*** material ***advertising the commercial availability or quality of any property, goods, or services*** which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4) (emphasis added). This nebulous definition fails to give sufficient guidance to potential fax senders as to what is proscribed by the Act, for it is often difficult to distinguish between commercial and non-commercial content. See A. Kozinski & S. Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627, 637-47 (1990) (describing the blurred and elusive distinction between commercial and non-commercial speech as one "with no basis in the Constitution, with no justification in the real world, and that often must be applied arbitrarily in any but the easiest cases.") It also provides no basis to determine what constitutes prior express invitation or permission.

For example, if an ambitious high school band uses fax advertising for its car wash or candy sale fundraiser, has it made these goods or services "commercially available"? Does a fax advertising a charitable event sponsored by a company in part to promote good will for its products or services fall within the ambit of the TCPA's sweeping prohibition? Similarly, if an auto dealer sponsors an essay contest for children and advertises that contest with a fax that includes only its name, address and phone number, has that dealer sent an "unsolicited advertisement" within the purview of the TCPA? What if Company A sells some widgets to South Africa and Company B sends an unsolicited fax notice stating, "Don't

support apartheid. Don't buy from Company A." Does this constitute advertisement of the commercial availability of a property, good or service or is it merely political speech? See A. Kozinski & S. Banner, Who's Afraid of Commercial Speech?, 76 Va. L. Rev. at 644. Will a company refrain out of fear of prosecution from using a fax campaign to more promptly warn consumers of a dangerous drug or product? These are but a few examples of how the TCPA's vagueness could prompt people to steer far wider of the unlawful zone and chill the exercise of their First Amendment freedoms.

Ironically, the vagueness of the TCPA is demonstrated first-hand by the filings in Vertex Chemical Corporation, *et al.* v. Barry D. Brace, D.M.D. & Associates, P.C., *et al.*, Cause No. 01AC-013006 GCV, another TCPA lawsuit out of the Circuit Court of St. Louis County, Missouri. The plaintiffs in the Vertex case, who also are represented by attorney Max Margulis, Harjoe's counsel herein, allege violations of the TCPA based on a dentist's faxed notices announcing the "Do a GOOD DEED Contest," (A39) an essay contest that rewards good deeds done by children and teenagers to encourage them to make the right choices in life. (LF 129-156.) Do the faxes at issue in Vertex really advertise the commercial availability of a property, good or service? It certainly would appear not, yet Harjoe's counsel apparently concluded that they do fall under the TCPA's umbrella. If lawyers cannot agree as to whether a particular fax falls within the proscriptive ambit of the TCPA, how can a layperson be expected to make such a determination?

Other illuminating examples of the Act's vagueness are fax opinion polls. (LF 127-128; A40-A41.) Again, these faxes do not appear to advertise the commercial availability of a property, good or service, and thus seemingly would not be proscribed by the TCPA's definition of advertisement. Yet, the FCC fined 21st Century Fax(es) Ltd. $1,107,500 for sending such "opinion poll" faxes. (LF 243-261.) Cf Missouri, 196 F. Supp. 2d at 925-26 (concluding that the very same fax polls, diet solicitations, and other such faxes were not covered by the TCPA).

Equally problematic, as evidenced by the 21st Century Fax(es) fine, the TCPA's vagueness impermissibly creates wide leeway for selective prosecution of speech by vesting virtually complete discretion in the hands of those charged with its enforcement to determine whether a fax sender is in compliance with the statute. This factor alone renders the TCPA unconstitutional as denying due process. See, e.g. Kolander v. Lawson, 461 U.S. 352, 358 (1983); Smith v. Goguen, 415 U.S. 566, 576 (1974).

These risks are exacerbated by the fact that in many instances the TCPA is being enforced essentially on an *ad hoc* basis in private state court actions brought by fax recipients against fax senders. These private actions often involve small claims that are neither zealously litigated nor subjected to serious judicial scrutiny, and present a very real risk that the statute will be interpreted to prohibit different expression in various judicial jurisdictions around the nation. The reality of this concern is underscored by Lutz Appellate Services v. Curry, 859 F. Supp. 180 (E.D. Pa. 1994), in which the

court held that the TCPA's prohibition on unsolicited advertisements does not extend to faxes advertising available jobs. Id. at 181-82.

Finally, the TCPA fails to specify what parties may be liable under the Act. Indeed, while the FCC has issued regulations indicating that the entity on whose behalf an advertisement is transmitted ultimately is liable for its transmission, at least one federal court has rejected the FCC's interpretation of the statute on this point. See State of Texas v. American Blast Fax, 121 F. Supp. 2d 1085, 1090-92 (W.D. Tex. 2000). This legal uncertainty has further complicated the dissemination by facsimile of truthful, non-misleading commercial speech.

When the TCPA is carefully examined, only one conclusion can be reached: It is often impossible for an ordinary person to determine whether a potential fax advertises "the commercial availability or quality of any property, goods, or services" or whether the sender has "prior express invitation or permission" from the recipient. Without this determination, it is impossible to determine whether a fax is prohibited by the TCPA, and to tailor conduct accordingly. This infirmity renders the statute unconstitutional and void for vagueness. Consequently, the trial court erred in enforcing the TCPA.

III. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment And In Denying Herz Financial's Motion For Summary Judgment, Because The TCPA Violates Constitutional Due Process Guarantees And The Eighth Amendment, In That The TCPA Imposes A Grossly Excessive Punishment On Persons Alleged To Have Violated Its Prohibition On Unsolicited Fax Advertising.

The automatic damages provided in the TCPA are completely out of proportion to the few pennies in cost shifted to the unwilling recipient of the sender's commercial message. The statute imposes $500 in damages, per fax transmission, for inadvertent violations, and up to $1,500 per fax transmission for knowing or willful violations. See 47 U.S.C. § 227(b)(3) & (f)(1). The first figure is approximately 10,000 times the actual cost of receiving a fax, the second approximately 30,000 times the actual cost of receiving a fax.

Needless to say, in a suit brought by the government or as a class action, a faxer's liability can add up quickly. See, Judgment, Nicholson v. Hooters of America, Inc., Case No. 95 - RCCV-616 (Ga. Sup. Ct., May 17, 2001) ($11,889,000 judgment). (LF 223, 262-302.) As a result, the TCPA's damages scheme has sparked an explosion in class action litigation, fueled by the strict liability scheme and the promise of at least a $500 award per plaintiff class member per fax transmission. "[I]n a classic case of the best

laid plans going awry, enterprising attorneys have gleaned, from the seemingly harmless packaging of consumer protection, a potent class-action weapon." Joseph N. Main P.C. v. Electronic Data Systems Corp., 168 F.R.D. 573, 575 (N.D. Tex. 1996) (denying motion for class certification for TCPA suit as being untimely). The devastating effects of this weapon were amply demonstrated in the Nicholson case when the jury entered a verdict in favor of a plaintiff class for $11,889,000. The $11,889,000 in damages were awarded to 1,321 class members who purportedly had been sent six unsolicited fax advertisements. (LF 223, 262-302.) The company that made the mistake of sponsoring those faxes was forced into bankruptcy. See In re Hooters of Augusta, Case No. 1-01-6K-67611 (U.S. Bankr. Ct., N.D. Ga., filed June 8, 2001). (LF 271.)

In Congress's haste to remedy what it speculated to be the harms supposedly posed by unsolicited commercial faxes, Congress chose a sledgehammer where a fly swatter would have sufficed. After all, the only tangible damage associated with unsolicited fax advertising is the cost incurred by a recipient for supplies used to print the fax—specifically paper and toner. Although it may elicit fleeting annoyance in the case of unwanted information, this practice inflicts no physical, emotional or other harm. Yet, the TCPA imposes damages that typically are more than 30,000 times the cost of receiving a single fax. When the fax is sent electronically to the recipient's computer, and deleted without ever incurring the cost of printing the fax, the fine imposed becomes even more outrageous.

Particularly in view of this class action weapon's ability to litigate companies out of existence, the TCPA's damages scheme is wildly excessive and cannot survive constitutional scrutiny.

A. The TCPA's Damages Provision Violates Due Process Guarantees.

These potential damage awards are unconstitutional because they violate the due process guarantee of the Fifth and Fourteenth Amendments to the United States Constitution. The Due Process Clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go" and prohibits a state from imposing grossly excessive punishment on a tortfeasor. TXO Productions Corp. v. Alliance Resources Corp., 509 U.S. 443, 453-454 (1993) (citations omitted). The Supreme Court applies a reasonableness standard to determine whether damages which are punitive in nature such as those provided in the TCPA are constitutional. TXO, 509 U.S. at 458.

The reasonableness of awarding punitive damages turns on three factors: (1) the reprehensibility of the defendant's conduct; (2) the ratio between the damages and the actual harm; and (3) how the punitive damage award compares with civil or criminal sanctions that could be imposed for similar conduct, a factor which is not at issue here. See BMW of North America v. Gore, 517 U.S. 559, 574-75 (1996).

The act of sending an unsolicited fax advertisement cannot properly be characterized as "reprehensible." The only harm alleged by Harjoe is the cost in time and supplies of receiving a fax—a harm that is at best debatable. Harjoe and other fax recipients have received potentially valuable information on goods, products or services in exchange for pennies a page in paper and toner. Herz Financial's conduct inflicts no physical, emotional or other harm. To the contrary, Herz Financial is merely attempting to provide a service to its customers and in the process distribute commercial information to Missouri businesses that may have need for its products. Still, Harjoe would have had Herz Financial pay $1,500 per fax page for conduct evincing no ill will whatsoever. (LF 54.)

Additionally, the ratio between the statutory damages and any actual harm suffered is off the charts. See BMW, 517 U.S. at 580-81. As demonstrated above, any "harm" inflicted upon the recipient of an unsolicited fax amounts to mere pennies or, in a fax-to-e-mail scenario, nothing at all. If a damage award equaling just four times the amount of actual harm comes "close to the line" of constitutional impropriety, Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1, 23-24 (1991), then the TCPA's structure of fines ranging from 10,000 to 30,000 times the harm alleged, 47 U.S.C. § 227(b)(3) and (f)(1), must erase the line altogether. Such a structure can only be characterized as grossly disproportionate. See BMW, at 582-83 (punitive damage award of approximately 500 times the amount of actual harm violated due process).

There can be no question, then, that a 10,000 or 30,000 to 1 ratio is extreme and impermissible under the Due Process Clauses of the Fifth and Fourteenths Amendments. Harjoe can point to nothing that might justify such an exorbitant civil penalty for sending consumers truthful ads about lawful business activity. For this reason alone, the TCPA's damages provisions are unconstitutional.

B. The TCPA's Damages Provision Violates the Eighth Amendment's Prohibition Against Excessive Fines.

Similarly, the TCPA's damages scheme violates the Eighth Amendment. In relevant part, the Eighth Amendment to the United States Constitution states that "excessive bail shall not be required, ***nor excessive fines imposed***." U.S. Const. amend. VIII (emphasis supplied). "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." United States v. Bajakajian, 424 U.S. 321, 334 (1998). "If the amount of the forfeiture is grossly disproportional to the gravity of the . . . offense, it is unconstitutional." Bajakajian, at 337 (35:1 forfeiture ratio violated the Eighth Amendment).

Harjoe cannot reasonably suggest that damages 10,000 to 30,000 times greater than the harm he allegedly seeks to vindicate are in any way reasonably proportional. This is particularly true as these costs are not

unique to the sending of commercial faxes, but rather are equally associated with non-commercial unsolicited faxes which the TCPA permits.

That the TCPA's damages scheme is unconstitutionally excessive is underscored by its chilling effect on the vital First Amendment interests at stake here. Very few statutes, if any, punish speech by imposing liability at the TCPA's extreme multiples of the actual harm suffered by listeners. But the Supreme Court has made clear that the First Amendment limits the size of the penalties that can be imposed on speech, because the fear of huge liability might deter speakers who are uncertain about whether their speech falls within the proscribed category. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974) (finding that in certain defamation suits, the First Amendment does not permit the imposition of liability in excess of the plaintiff's actual loss). If speech could give rise to damages in excess of those necessary to compensate the plaintiff, the Court explained, the result would be "to inhibit the vigorous exercise of First Amendment freedoms." Id. at 349.

The concerns that drive the Gertz decision are equally present here. The prospect of the staggering liability imposed by the TCPA deters fax advertisers from sending faxes even to people who would welcome them, for fear that if they have misjudged recipients' preferences, a suit under the TCPA will follow. As in Gertz, the fear of enormous potential liability inhibits the exercise of First Amendment freedoms, and suppresses speech that would be valued by speakers and audiences alike.

In the end, the TCPA's draconian remedial provisions are unconstitutional because they threaten to drive legitimate businesses out of existence or into bankruptcy by imposing damages that are wildly disproportionate to the few pennies in cost incurred by the fax recipient. By imposing damages up to 30,000 times the minimal cost of receiving a single unsolicited fax advertisement, the Act violates the Fifth and Fourteenth Amendments' due process guarantees against exorbitant penalties and the Eighth Amendment's prohibition against excessive fines.

IV. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because It Incorrectly Applied the Summary Judgment Standard, In That It Failed To Require Harjoe To Demonstrate That Herz Financial's Affirmative Defenses Of Lack Of Standing, Failure To Mitigate, And The Unconstitutionality Of The TCPA Fail As A Matter Of Law, And In That The Trial Court Ignored Genuine Issues Of Material Fact Related To Herz Financial's Affirmative Defenses.

The trial court erred in granting Harjoe's Motion for Summary Judgment as Harjoe failed to demonstrate that Herz Financial's Affirmative Defenses fail as a matter of law. "[A] claimant moving for summary judgment in the face of an affirmative defense must also establish that the

affirmative defense fails as a matter of law." Central Missouri Elec. Co-op. v. Wayne, 18 S.W.3d 46, 52 (Mo. App. W.D. 2000). The viability of Harjoe's right to summary judgment depends not only on the viability of his claim, but also on the non-viability of Herz Financial's affirmative defenses. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. banc 1993). Summary judgment is improper when the party opposing summary judgment answers with evidentiary material related to an affirmative defense even if the opposing party does not admit or deny the factual allegations. Miller v. Big River Concrete, LLC, 14 S.W.3d 129 (Mo. App. E.D. 2000).

Herz Financial's Opposition to Harjoe's Motion for Summary Judgment not only disputed Harjoe's factual allegations, as discussed more fully below, but also answered with evidentiary material related to its affirmative defenses. (LF 484-499, 500-511.) Herz Financial's Answer raises certain affirmative defenses, including, *inter alia*:

(a) The TCPA is unconstitutionally vague, unconstitutionally restricts protected commercial speech, and creates a damages remedy that unconstitutionally imposes a grossly excessive punishment. (LF 33.)[19]

(b) Harjoe lacks standing as he received the alleged facsimiles while in the course and scope of his employment with Northwestern Mutual Life. (LF 34.)

(c) Harjoe failed to mitigate his damages by failing to request to be placed on Herz Financial's no-fax list or by taking any other action. Rather, Harjoe allowed the facsimiles to continue in an effort to build rather than mitigate his damages. (LF 34.)

Harjoe's Motion for Summary Judgment fails to address his standing. Moreover, genuine issues of material fact exist with respect to Harjoe's standing, thereby precluding judgment as a matter of law. The facsimile banners (the printouts at the top of faxes) reference "CLU Northwestern"

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[19]The issues and evidence related to this affirmative defense were also raised in Herz Financial's Cross-Motion for Summary Judgment, the denial of which have been assigned to separate Points Relied On, *infra*. For purposes of this fourth Point Relied On, Herz Financial simply notes that the trial court erred in not requiring Harjoe to demonstrate that these affirmative defenses fail as a matter of law. Points I, II and III, above, demonstrate the validity of these affirmative defenses.

and the facsimiles are addressed to David L. Harjoe at "Northwestern Mutual Life." (LF 225-242.) Therefore, the trial court granted Harjoe's Motion for Summary Judgment without regard to whether Harjoe or Northwestern Mutual Life had standing to invoke the TCPA. With this issue left unresolved, any employee, secretary or clerk would have standing to bring a TCPA action in lieu of his or her employer.

Harjoe's Motion for Summary Judgment also fails to address mitigation of damages. Herz Financial's Opposition to Harjoe's Motion for Summary Judgment raises specific facts disputing mitigation and precluding judgment as a matter of law. (LF 494, 503.) As set forth in the first facsimile allegedly received by Harjoe, and subsequent facsimiles, the recipient is instructed to "please call toll free at 1-800-432-8086 or fax this back with your fax # to have your fax number permanently removed from our customer list." (LF 12, 98.) Herz Financial maintains a no-fax list, and Herz Financial would have removed Harjoe from the list upon request. (LF 98.)

Harjoe failed to demonstrate that Herz Financial's affirmative defenses fail as a matter of law. Furthermore, in response to Harjoe's Motion for Summary Judgment, Herz Financial set forth evidentiary material related to its affirmative defenses. Therefore, the trial court erred in granting Harjoe's Motion for Summary Judgment.

V. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment Because, The Motion Failed To Comply With Missouri Supreme Court Rule 74.04, In That Harjoe Set Forth Legal Conclusions And Ultimate Facts Without Specific Citations To Pleadings, Discovery Or Admissible Affidavit Statements.

Harjoe's Motion for Summary Judgment fails to comply with Missouri Supreme Court Rule 74.04(c)(1) as there exists no specific reference to the pleadings, discovery or affidavit for the allegations contained in Paragraphs 14, 15, 19, 20 and 24 of the Motion. (LF 43-44; A42-A43.) Collectively, those bare allegations state that "[e]ach of the faxes at issue contains material advertising the commercial availability or quality of property, goods, or services" (LF 43 at ¶ 14); "The faxes at issue were created for advertising purposes" (LF 43 at ¶ 15); "Defendant has no documents or evidence to support any claim of prior express permission or invitation to send facsimile advertisements to Plaintiff" (LF 44 at ¶ 19); "Defendant has no documents or evidence to support any claim of an established business relationship" (LF 44 at ¶ 20); and "Defendant knew, or should have known that it was directly, or indirectly through an agent, engaging in the act of sending advertisements." (LF 44 at ¶ 24.) These allegations recite nothing more that Plaintiff's Petition. A party "may not rest upon the allegations or denials of the party's pleading." Rule 74.04(e).

Harjoe's Motion for Summary Judgment also fails to comply with Missouri Supreme Court Rule 74.04(e), in that Paragraphs 16, 17 and 18 rely on legal conclusions and ultimate facts set forth in a self-serving Affidavit prepared by Plaintiff. (LF 44, 55-56.) Collectively, those allegations state that "Plaintiff did not grant prior express permission to Defendant to permit the sending of unsolicited advertisements to Plaintiff's telephone facsimile machine" (LF 44 at ¶ 16); "Defendant did not obtain prior express invitation or permission from Plaintiff to send the faxes at issue to Plaintiff" (LF 44 at ¶ 17); and "Defendant had no established business relationship with Plaintiff at the time the faxes at issue were transmitted" (LF 44 at ¶ 18). Affidavits in support of a summary judgment motion must contain more than conclusory allegations. Missouri Insurance Guaranty Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28 (Mo. App. 1991); Bakewell v. Missouri State Employees' Retirement System, 668 S.W.2d 224, *on remand*, 706 S.W.2d 268 (Mo. App. 1986). When the movant submits a defective supporting affidavit, the non-moving party's burden of presenting facts outside of the pleadings, through affidavits, interrogatories and depositions no longer applies. Bakewell, *supra*.

Harjoe's Motion for Summary Judgment recites nothing more than the allegations contained in his Petition. Such unsupported allegations, conclusions of ultimate fact, and legal conclusions fail to comply with the summary judgment procedure and standard set forth in Missouri Supreme

Court Rule 74.04. (A42-A43.) Accordingly, the trial court's order granting Harjoe's Motion for Summary Judgment must be reversed.

VI. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because Harjoe Failed To Satisfy The Summary Judgment Standard, In That Herz Financial Demonstrated The Existence Of Genuine Issues Of Material Fact With Respect To Whether Harjoe Had Given Express Invitation Or Permission To And Whether Harjoe Had An Established Business Relationship With Herz Financial.

At a very minimum, Herz Financial raised genuine issues of material fact in response to Harjoe's unsupported conclusions. The trial court therefore erred in granting summary judgment in his favor. See Missouri Supreme Court Rule 74.04 (A42-A43); see also, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 380 (Mo. banc 1993).

In addition to presenting evidentiary material related to its affirmative defenses, as discussed fully in Herz Financial's fourth Point Relied On, Herz Financial also presented evidentiary material demonstrating the existence of genuine issues of material fact with respect to Harjoe's unsupported allegations that he did not grant prior express permission to Herz Financial

to send facsimiles, that he did not have an established business relationship with Herz Financial, and that Herz Financial has no documents to support permission or a business relationship. Specifically, Herz Financial responded to these allegations with the Affidavit of Matthew Herz, Vice President of Sales for Herz Financial, who stated that Herz Financial obtained facsimile number (314) 878-7277 only through direct contact by Harjoe or someone purporting to be Harjoe. (LF 496.) This direct contact with Herz Financial could only have been via its website at www.justdi.com, via telephone or some other form of direct contact. (LF 496.) Herz Financial also produced a printout of the information directly provided to Herz Financial. (LF 496, 498-499.) This affidavit testimony was sufficient to contradict Harjoe's unsupported allegations.

A trial court has no authority to weigh the credibility of conflicting affidavits in adjudicating a motion for summary judgment. New Prime, Inc. v. Professional Logistics, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000). Such conflicting evidence clearly created a factual dispute as to whether Harjoe gave permission or was establishing a business relationship with Herz Financial. Due to the existence of these genuine issues of material fact, the trial court erred in granting Harjoe's Motion for Summary Judgment.

VII. The Trial Court Erred In Granting Harjoe's Motion For Summary Judgment, Because It Awarded Damages In Excess Of The Statutory Amount, In That The TCPA Provides For $500 For Each Facsimile Transmission, Not Each Page Transmitted.

Under the TCPA, a plaintiff may elect to recover either a statutory amount of $500 in damages for each "violation" of the TCPA or "actual monetary loss." 47 U.S.C. § 227(b)(3)(B). Harjoe's Motion for Summary Judgment did not allege any facts related to the issue of damages. Rather, he merely and arbitrarily requested $18,000. (LF 54.)

The trial court found "that eighteen unsolicited faxes were received by Plaintiff" and entered judgment "for the Plaintiff for $500.00 (Five Hundred Dollars and No Cents) for each fax for a total Judgment of $9000.00 (Nine Thousand Dollars and No Cents)." (LF 774; A8.) However, the undisputed evidence was that Herz Financial sent or caused to be sent only nine fax transmissions consisting of two pages each, not 18 separate transmissions. (LF 487, 496-497.)

The trial court erred in determining there were 18 violations of the TCPA because it is the transmission which constitutes a violation, not the number of pages sent in one transmission. Congress's intent in this regard is evident in the definition of "unsolicited advertisement," that is, "material advertising the commercial availability or quality of any property, goods, or

services which is **transmitted**[.]" 47 U.S.C. § 227 (a)(4) (emphasis supplied).[20] There is no limit on the number of pages transmitted.

On a per transmission basis, Harjoe received only nine transmissions, not 18. (LF 487, 496-497.) A contrary reading would only support Herz Financial's contention that the TCPA is void for vagueness, all as more fully set forth in the second Point Relied On, as there is no other guidance as to what constitutes a violation.

That Congress intended a violation to be calculated on a per transmission basis rather than per page basis also is evident in the TCPA's alternative damages measurement, e.g., "actual monetary loss from such a violation." 47 U.S.C. § 227(b)(3)(B). (A1-A6.) Had Congress intended a per page rather than a per transmission calculation, it would not have offered Harjoe the choice to seek actual monetary loss. Congress clearly sought to protect recipients of multiple-page transmissions by allowing them to elect to receive actual monetary loss if greater than $500.

For these reasons, the trial court erred in granting Harjoe twice the amount of statutory damages recoverable under the TCPA.

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[20]The TCPA defines a "telephone solicitation" as the "initiation of a telephone call . . . which is **transmitted** to any person." 47 U.S.C. 227(a)(3) (emphasis supplied). As with the fax provision, there is no time, content or page limit to each call, just an initiation and a transmission.

VIII. The Trial Court Erred In Denying Herz Financial's Motion For Summary Judgment, Because The Trial Court Relied On Inadmissible Opposing Affidavits, In That The Opposing Affidavits Failed To Comply With Supreme Court Rule 74.04(e) As The Opposing Affidavits Were Not Made On Personal Knowledg-e, The Opposing Affidavits Lack Foundation, And The Opposing Affidavits Rely On And Incorporate Irrelevant Hearsay.

In opposition to Herz Financial's Motion for Summary Judgment, Harjoe proffered the affidavits of Douglas M. McKenna and Joe Shields. (LF 642 and 656; A44 and A57, respectively.) Herz Financial responded with a Motion to Strike which detailed its objections to these affidavits. (LF 741-748.) The trial court declined to reject these affidavits (LF 773; A7), and presumably relie on the affidavits when it issued its judgment without opinion. (LF 774; A8.) In fact, without the affidavits, the trial court had scant evidence upon which to deny Herz Financial's Motion for Summary Judgment as the trial court had properly stricken all other attempts by Harjoe to rely on unfounded hearsay statements and newspaper articles throughout his brief. (LF 748-751, 773; A7.)

Missouri Supreme Court Rule 74.04(e) provides that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the

affiant is competent to testify to the matters stated therein." Rule 74.04(e). (A42-A43). An affidavit in opposition to summary judgment must state specific facts and not conclusions. First Community Bank v. Western Sur. Co., 878 S.W.2d 887 (Mo.App. S.D. 1994). An affidavit that fails to aver specific facts and relies only upon mere doubt and speculation fails to raise any issues of material fact. J.S. DeWeese Co. v. Hughes Treitler Mfg. Corp., 881 S.W.2d 638, 646 (Mo.App. E.D. 1994); see also Morely v. Ward, 726 S.W.2d 799, 805 (Mo.App. E.D. 1987). Hearsay statements and uncertified documents attached to an affidavit "are not facts admissible in evidence and should not be considered by a trial court in adjudicating a motion for summary judgment." New Prime, Inc. v. Professional Logistics, 28 S.W.3d 898, 905 (Mo.App. S.D. 2000).

The trial court erred in considering the affidavits of Douglas McKenna and Joe Shields as their affidavits violate each of the above principles. The affidavits purport to espouse expert opinions in connection with matters for which McKenna and Shields are not qualified; the affidavits contain statements not within the realm of personal knowledge of McKenna and Shields; and the affidavits contain hearsay statements and attempt to incorporate exhibits which are irrelevant, lack foundation, and/or constitute hearsay.

Furthermore, the hearsay documents cited in the Affidavit of McKenna, however improper, were not even before the trial court as they

were not attached as indicated by McKenna.[21] Additionally, the Shields' affidavit was not even prepared for this case. It is dated September 1, 2000, almost a year prior to the filing of Harjoe's Petition. (LF 657.)

Finally, McKenna and Shields were proffered as experts in Kaufman *et al*. v. ACS Systems, Inc. et al., Case No. BC222588, Superior Court of the State of California for the County of Los Angeles. The court in that case rejected their testimony on nearly identical affidavits for the above reasons. The Superior Court's Tentative Statement of Decision, which rejects McKenna's and Shield's testimony, was attached to Plaintiff's Memorandum in Opposition. (LF 625; rejecting the testimony at LF 627.)

A cursory *de novo* review of these affidavits quickly reveals the countless violations of Missouri Supreme Court Rule 74.04(e) governing affidavits in opposition of summary judgment. For the Court's convenience, Herz Financial has included these affidavits in its appendix at A44 and A57.

CONCLUSION

The judgment of the trial court should be reversed, and summary judgment should be entered in favor of Appellant Herz Financial and against Respondent Harjoe.

[21]Based on Herz Financial's review and preparation of the Legal File and based on the copy of the affidavit served on Herz Financial.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06 and, according to the word count function of Microsoft Word 97 by which it was prepared, contains 20,177 words, exclusive of the cover, Certificate of Service, and this Certificate and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus free.

_____

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Brief of Appellant Herz Financial, one copy of the Appendix (Volumes I and II), and one diskette containing the foregoing Brief were served by regular U.S. Mail, postage prepaid, to Max G. Margulis, Esq., Margulis Law Group, 14236 Cedar Springs Drive, Chesterfield, Missouri 63017, counsel for Respondent, this **25th** day of October, 2002.

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